

No. 04-2590

[UNPUBLISHED]

Ray Hobbs, Deputy Assistant Director, *
Arkansas Department of Correction; *
Robert Clark, Administrator, Arkansas *
Department of Correction; Max *
Mobley, Assistant Director, Arkansas *
Department of Correction; R. L. Toney, *
Warden, Arkansas Department of *
Correction; R. E. Manus, Assistant *
Warden, Arkansas Department of *
Correction; T. Moncrief, Assistant *
Warden, Arkansas Department of *
Correction; Carlee Griswold, Captain, *
Arkansas Department of Correction, *

Appellees. *

No. 04-4007

Lee Charles Millsap, Jr., also known *
as Solomon Lee, *

Appellant, *

v. *

Jefferson County; Lincoln County, *
Arkansas; Ray Hobbs, Chief Deputy *
Director, Jefferson and Lincoln County *
Department of Correction; Larry May, *
Deputy Director, Jefferson and Lincoln *
County Department of Correction; *
Tiffanye Compton, Secretary, *
Arkansas Department of Correction; *
Rick L. Toney, Warden, Varner Super *
Max, ADC; James Banks, Assistant *

Warden, Varner Super Max, ADC; *
Randall Manus, Assistant Warden, *
Varner Super Max, ADC; Jim W. Via, *
Captain, Varner Super Max, ADC; T. *
Brown, Administrative Review Officer, *
Varner Super Max, ADC; J. Owen, *
CO-II, Varner Super Max, ADC; S. *
Jordan, Security Officer, Varner Super *
Max, ADC; B. Smallwood, Mail Room *
Supervisor, Varner Super Max, ADC; *
S. Brasfield, Mail Room Supervisor, *
Varner Super Max, ADC, *
*
Appellees. *

Submitted: January 14, 2005
Filed: January 31, 2005

Before MURPHY, BYE, and SMITH, Circuit Judges

PER CURIAM.

We consolidate these two appeals brought by Arkansas prisoner Solomon Lee Millsap (also known as Lee Charles Millsap). In Appeal No. 04-4007, Millsap v. Jefferson County, we cannot review Millsap's challenges to the orders issued by a magistrate judge, as Millsap did not file with the district court his objections to these rulings on nondispositive matters. See Fed. R. Civ. P. 72(a).

We note this is the second time the case underlying Appeal No. 04-4007 has been before us. The first time, we remanded for further proceedings as it was unclear whether Millsap had three "strikes" under 28 U.S.C. § 1915(g), inasmuch as we could not tell whether either of two previous actions dismissed for failure to exhaust

administrative remedies qualified as a strike. See Millsap v. Jefferson County, 85 Fed. Appx. 539 (8th Cir. 2003) (unpublished per curiam).

In Millsap v. Wright, the case underlying Appeal No. 04-2590, the district court also dismissed based on its conclusion that Millsap had three “strikes.” Because the three-strikes issue remains unclear, we remand in Appeal No. 04-2590. We suggest that, on remand, the case be held in abeyance until the district court determines in Millsap v. Jefferson County whether either Millsap v. Collins, 5:98CV333, or Millsap v. Norris, 5:98CV417, was dismissed for failure to allege exhaustion (which would result in a strike), rather than for actual failure to exhaust notwithstanding an allegation of exhaustion (which would not result in a strike). If the district court determines that either of these two dismissals qualifies as a strike, bringing Millsap’s total number of strikes to three, the court may proceed in accordance with section 1915(g). If the court determines that neither dismissal constitutes a strike, and thus that Millsap has not accumulated three qualifying dismissals, Millsap v. Wright should be reassigned to a judge who is not a defendant. See 28 U.S.C. § 455(b)(5)(i).

Accordingly, we dismiss Appeal No. 04-4007 for lack of an appealable order. In Appeal No. 04-2590, we remand for further proceedings consistent with this opinion. We deny all pending motions.
